(4)

No. 98-591

In The

Supreme Court of The United States

OCTOBER TERM, 1998

Albertsons, Inc., *Petitioner*

v.

Hallie Kirkingburg, *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. The Petition For Writ Of Certiorari Should Be Denied Because The Court Of Appeals' Decision Was Not Erroneous And There Is No Split Among The Circuit Courts Regarding The Issues Presented.

A. Petitioner Relies Upon A Mischaracterization Of The Record To Support Its Arguments.

Petitioner asserts that the Ninth Circuit wrongly relied upon evidence not in the record in ruling that there was a genuine issue of material fact regarding whether Respondent was a qualified individual with a disability under the Americans With Disabilities Act (ADA). 42 U.S.C. § 12112(a) (1994). Petitioner's assertion is simply wrong.

The Ninth Circuit stated:

> Kirkingburg has presented uncontroverted evidence showing that he suffers from amblyopia, a condition resulting in his being almost totally blind in his left eye. In short, he has monocular vision. Given the nature of the condition and its permanence, there is no question that Kirkingburg is substantially limited in the major life activity of seeing. Kirkingburg's inability to see out one eye affects his peripheral vision and

his depth perception. Although his brain has developed subconscious mechanisms for coping with this visual impairment and thus his body compensates for his disability, the *manner* in which he sees differs significantly from the *manner* in which most people see. To put it in its simplest terms, Kirkingburg sees using only one eye; most people see using two. Accordingly, under the statute and implementing regulations, if the facts are as Kirkingburg alleges, he is disabled. *Kirkingburg v.* Albertsons, 143 F.3d 1228 (9th Cir. 1998) (App. to Pet. for Cert., at 14a-15a).

The uncontroverted evidence the court referred to was provided, in part, in material submitted as part of Plaintiff's Motion to Submit Additional Materials In Opposition to Defendant's Motion for Summary Judgment. CR 45, 47; Excerpts of Record, pp. 187-210. That material included deposition testimony from Ms. Beatrice Michel, O.D., Respondent's treating doctor of optometry. Dr. Michel testified in part to the following:

> Q. Do you have any medical opinion whether Hallie Kirkingburg would be a better or worse driver than someone with good binocular vision under the conditions I previously asked you about, over the road, interstate driving with a couple of trailers?

A. Well, if that is the only basis of judgment, I would say he would be equally competent because, again, this has been a lifelong condition. He has made adaptations and adjustments which work very well for him, and I don't think that he, on the basis of vision alone, would be better or worse than someone with binocular vision.

Q. What adaptations and compensations has Mr. Kirkingburg personally made on the basis of his eye long vision -- or his lifelong vision?

A. Well, if someone is newly --

Q. Not someone. I'm asking you about your patient, Hallie Kirkingburg, that you personally know as his physician, what adjustments or adaptations he personally has made, not what someone you imagine would have done with his vision.

A. I see. Mr. Kirkingburg, having had this condition since childhood, has not had binocular vision since childhood, and given that, has always functioned as a one-eyed person and has always relied on monocular cues.

The reason why this is sufficient, this is different for a person who is newly one eyed. For a person newly one eyed who has relied generally on two-eyed vision, much

more adaptation is required because this is a new way of vision for them. They have to compensate in ways that Hallie has learned as a child.

Given Dr. Michel's testimony Petitioner's assertion that there is no evidence in the record to support the Court of Appeals' ruling is simply untenable.

B. There Is No Split Among The Circuits. The Only Other Circuit To Address The Issue Of Whether An Individual With Monocular Vision Is Disabled Due To The Manner In Which He Or She Sees Held The Same As The Ninth Circuit In The Present Case.

Petitioner attempts to create a split among the Circuits where there is none, by arguing that the decision in *Doane v. City of Omaha,* 115 F.3d 624 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 693 (Jan. 12, 1998), conflicts with the decision in *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50 (5th Cir. 1991). Respondent's attempt fails because, as the Ninth Circuit explained in commenting on *Still, supra,* "Notably, the *Still* court did not cite or discuss 29 C.F.R. § 1630.2(j)(l)(ii) in reaching its decision. Accordingly, we agree with the Eighth Circuit's analysis and reject the Fifth Circuit's." *Kirkingburg, supra,* at fn. 4 (App. to Pet. For Cert. at 15a) (emphasis added).

It is the application of 29 C.F.R. § 1630.2(j)(l)(ii), to which Respondent objects. Under that regulation the manner under which an individual can perform a particular major life activity is relevant to the analysis of whether the individual is disabled under the ADA. The *Doane* court applied that regulation in its analysis of whether a monocular vision police officer was disabled and held that he was. The *Still* court did not apply the regulation in question and indeed did not address the applicability of the regulation to its analysis. In *Kirkingburg* the Ninth Circuit applied the regulation in its analysis, held Respondent was disabled, and explained its holding was consistent with *Doane*. Thus, there is no conflict among the Circuits. The Eighth and Ninth Circuits are the only circuits that have addressed the issue and they are consistent between themselves. The Fifth Circuit's ruling in *Still* is not in conflict with *Doane* and the present case. It is simply distinguishable.

C. The Court of Appeals Decision Is Not Erroneous. Respondent's Restated Argument That It Can Selectively Adopt And Reject Parts Of The Federal Regulatory Scheme Was Properly Rejected By The Court of Appeals And Does Not Warrant This Court's Review.

While reformulating its argument to the Court of Appeals, Respondent strains to make the status of the DOT waiver program a significant issue warranting this Court's review. Respondent argues that the waiver program was not part of the federal

"regulations in 1992." Pet. for Cert. at 17. However, this is simply a matter of semantics.

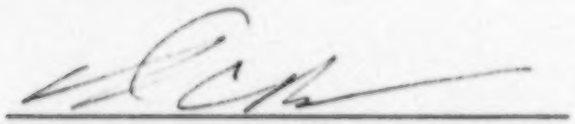
As the Ninth Circuit repeatedly explained, the DOT waiver program is part of the "regulatory scheme." *E.g., Kirkingburg, supra,* fn. 8 (App. to Pet. for Cert. at 24a). "The statute governing DOT safety regulations specifically includes a provision for allowing waiver of the regular standards and we consider the `scheme' to include all the relevant rules, regulations and statutory provisions." *Id.*; *accord Rauenhorst v. U.S. Department of Transp.*, 95 F.3d 715, 716-718 (8th Cir. 1996), *citing in part*, 49 U.S.C. § 31136(e). In addition, in connection with passage of the ADA, Congress directed the DOT to make the necessary changes to its regulations in order to end unwarranted discrimination against the disabled. *Rauenhorst, supra,* at 717. The waiver program in question was the DOT's attempt to bring its regulations into compliance with the ADA. *Id.*; *accord, Kirkingburg, supra* (App. to Pet. for Cert. at 20a). The Ninth Circuit correctly rejected Respondent's argument that it should be allowed to select which parts of the DOT regulatory scheme it would accept or reject, especially since here Respondent was rejecting those DOT rules and regulations intended to avoid systematic discrimination against the disabled. That holding was a proper interpretation of federal law. Therefore, there is no need to review that holding.

II. Conclusion.

For the foregoing reasons this Court should deny Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

DATED this 6th day of November, 1998.

Respectfully submitted,



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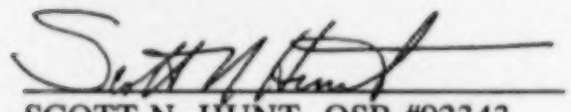

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